IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 638

RUDOLPH LOMBARD, ET AL.,
Petitioners,

versus

STATE OF LOUISIANA.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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May It Please the Court:

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATES OF THE SUPREME COURT OF THE UNITED STATES:

In accordance with Your Honors' request, we submit below the response to the petition for a writ of certiorari to the Supreme Court of the State of Louisiana.

(1)

We respectfully submit that the application for this writ has added nothing to the brief which was filed by attorneys for these defendants in the Louisiana Su-

preme Court and that they have failed to point out wherein any finding of fact upon which a conclusion of law was based or that any conclusion of law by the Louisiana Supreme Court is in error.

(2)

The questions presented on page two of the petition, paragraph one, is totally in error for, as shown by the second paragraph on page three of the appendix, the factual situation shows the record was replete with evidence of their guilt.

(3)

Paragraph two is answered by the statute itself, which shows there is nothing vague or indefinite about it.

(4)

Paragraph three of the questions presented is again absolutely untrue as the facts and the opinion of the Louisiana Supreme Court show that these defendants were requested to leave the premises in accordance with the policy of the store, fixed and determined by the manager in catering to the desire of his customers, and not as any part of an alleged policy of the State of Louisiana of racial discrimination, there being no such statutes of the State of Louisiana.

(5)

Paragraph four is a conclusion of law of the pleader and is not a complete statement of law as freedom of

speech and expression, under the decisions of this Court, can be limited.

(6)

Paragraphs five, six and seven have all been fully answered by the decision of the Louisiana Supreme Court and all of which were very fully and completely answered by the trial judge, Honorable J. Bernard Cocke, in giving his written reasons for overruling the motion to quash in pages 32 to 73 of the transcript which we have attached in printed form as Appendix "A," and included in the appendix Judge Cocke's *per curiams* to all of the bills of exceptions taken by the defendants.

(7)

On page 23, paragraph two of the application for the writ it is stated that "in a large number of places this nationwide protest has prompted startling changes at lunch counters throughout the South and service is now afforded in many establishments on a nonsegregated basis."

As shown on page 11 of the appendix by petitioners, the Louisiana Supreme Court points out there is no anti-discrimination statute in Louisiana nor is there any legislation compelling the segregation of the races in restaurants or places where food is served.

(8)

Inasmuch as we believe that the Louisiana Supreme Court has decided all the constitutional issues in this matter in accordance with the existing jurisprudence of Your

Honors, as shown in the opinions cited, the application for the writ should be denied.

Respectfully submitted,

JACK P. F. GREMILLION,
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CERTIFICATE OF SERVICE.

I, M. E. Culligan, Member of the Bar of the Supreme Court of the United States, hereby certify that a copy of this Response to the Petition for Writ of Certiorari to the Supreme Court of the United States and the appendix thereto, has been mailed by United States mail, postage prepaid, to attorneys for the defendants, namely, John P. Nelson, Jr., 702 Gravier Building, 535 Gravier Street, New Orleans 12, Louisiana, and Lolis E. Elie, Nils R. Douglas, Robert F. Collings, 2211 Dryades Street, New Orleans, Louisiana.

Assistant Attorney General.

APPENDIX "A"

DISTRICT COURT WRITTEN JUDGMENT ON MOTION TO QUASH.

STATE OF LOUISIANA
VERSUS
SIDNEY L. GOLDFINCH, JR.
ET. AL.

NO. 168-520—
SECTION "E"
CRIMINAL DISTRICT
COURT
PARISH OF ORLEANS

JUDGEMENT

The defendants, Rudolph Lombard, a colored male, Oretha Castle, a colored female, Cecil Carter, Jr., a colored male, and Sydney L. Goldfinch, Jr., a white male, are jointly charged in a bill of information which reads as follows:

> "* * * that on the 17th. of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant, and to desist from the temporary possession of same, contrary, etc."

The particular statute under which defendants are charged is L.S.A.-R.S. 14:59 (6) which reads as follows:

> "Criminal mischief is the intentional performance of any of the following acts: * * *
>
> "(6) taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The defendants moved the Court to quash the bill of information.

As cause for quashing the bill, defendants alleged "that movers were deprived of the due process of law and equal protection of law guaranteed by the Constitution and laws of the State of Louisiana and of the United States of America as follows:"

> "(1) That the statutes under which the defendants are charged are unconstitutional and in contravention of the Fourteenth Amendment of the Constitution of the United States of America, and in contravention of the Constitution of the State of Louisiana, in that they were enacted for the specific purpose and intent to implement and further the state's policy of enforced segregation of races.'
>
> "(2) That the said defendants are being deprived of their rights under the "equal protection and due

process" clauses of both the Constitution of Louisiana and of the United States of America in that the said laws under which the bill of Information is being enforced against them arbitrarily, capriciously and discriminately, in that it is being applied and administered unjustly and only against persons of the Negro race and or white persons who act in concert with members of the Negro race.'

"(3) That the statutes under which the prosecution is based and the Bill of Information founded thereon, are both so vague, indefinite and uncertain as not to establish an ascertainable standard of guilt.'

"(4) That the statutes under which the prosecution is based, exceed the police power of the state in that they have no real, substantial or rational relation to the public safety, health, morals, or general welfare, but have for their purpose and object, governmentally sponsored and enforced separation of races, thus, denying the defendants their rights under the first, thirteenth and fourteenth Amendment to the United States Constitution and art. I Section 2 of the Louisiana Constitution.'

"(5) That the bill of information on which the prosecution is based, does nothing more than set forth a conclusion of law, and does not state with certainty and sufficient clarity the nature of the accusation.'

"(6) That the statutes deprive your defendants of equal protection of the law in that it excludes from

its provisions a certain class of citizen, namely those who are at the time active with others in furtherance of certain union activities.'

"(7) That the refusal to give service because of race, the arrest and subsequent charge are all unconstitutional acts in violation of the Fourteenth Amendment of the United States Constitution in that the act of the Company's representative was not the free will act of a private citizen but rather an act which was encouraged, fostered and promoted by state authority in support of a custom and policy of enforced segregation of races at lunch counters.'

"(8) That the arrest, charge and prosecution of defendants are unconstitutional, in that it is the result of state and Municipal action, the practical effect of which is to encourage and foster discrimination by private parties."

In support of their motion to quash, the defendants offered the testimony of the following named witnesses, deLesseps S. Morrison, Mayor of the City of New Orleans, Joseph I. Giarrusso, Superintendent of Police, and Wendell Barrett, Manager of McCrory's 5 and 10 Cents Store.

The Mayor testified in substance as follows:

That the Superintendent of Police serves under his direction: that he and the City Government "set the lines or direction of policy to the police department."

That a statement appearing in the Times-Picayune dated September 13, 1960, page 7 of Section 1, was an

accurate report of a statement issued by him following the initial "sit-in" and follow up demonstration at the F. W. Woolworth Store on September 9, 1960.

The essence of the Mayor's statement filed in evidence was, that he had directed the superintendent of police not to permit any additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers; that it was his determination that the community interest, the public safety, and the economic welfare of the city required that such demonstrations cease and that they be prohibited by the police department.

The Mayor further testified:

That he did not know of any places in the City of New Orleans, where whites and negroes were served at the same lunch counter.

The Superintendent of Police identified as accurate a statement of his appearing in the Times-Picayune, Page 18, Section 1, dated September 10, 1960; that his reason for issuing the statement was that a recurrence of the sit-in demonstration as had occurred at the Woolworth Store on September 9, 1960, would provoke disorder in the community.

In his statement, the Superintendent of Police, made known that his department was prepared to take prompt and effective action against any person or group who disturbed the peace or created disorders on public or private property. He also exhorted the parents of both white and negro students who participated in the

Woolworth Store "sit-in" demonstration to urge upon these young people that such actions were not in the community interest; etc.

He further testified that as a resident of the City of New Orleans and as a member of the police department for 15 years, he did not know of any public establishment that catered to both white and negro at the same lunch counter.

Mr. Wendell Barrett testified, that he was and had been the Manager of McCrory's 5 and 10 Cents Store in the City of New Orleans for about 3 years; that the store was made up of individual departments, and catered to the general public.

That the policy of McCrory's national organization as to segregated lunch counters, was to permit the local manager discretion to determine same, consideration being had for local tradition, customs and law, as interpreted by the local manager; that in conformity with this policy, he determined whether lunch counters in the local McCrory's store would be segregated or not.

That on September 17th., 1960, there was a "sit-in" demonstration in the local store of McCrory's, involving one white man and some negroes; that he was in the store at the time.

At the conclusion of the testimony of this witness, the defendants offered in evidence, "House bills of the Louisiana Legislature of 1960, 343 through 366, which bills were all introduced by Representatives Fields, Lehrman

and Triche, and to be specific Numbers 343, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 360, 61, 62, 63, 64, 65, 66. All of which bills did not pass, but they are in the Journal. Also introduced and received in evidence were Acts 69, 73, 77, 78, 79, 70, 76, 81 and 68.

The motion to quash was submitted without argument.

A consideration of defendants' motion to quash, as well as the factual presentation on the hearing thereof, discloses defendants' position to be, that the enactment of L.S.A.-R.S. 14:59(6) by the Louisiana Legislature of 1960, was part of a "package deal", wherein and with specific purpose and intent, that body sought to implement and further the state's policy of enforced segregation of the races.

In addition, the same pleading and factual presentation, was offered by defendants' to support their contention, that L.S.A.-R.S. 14:59(6), was enforced against them arbitrarily, capriciously and discriminately in that it was being applied and administered unjustly and illegally, and only against persons of the negro race, and or white persons who acted in concert with members of the Negro race.

The courts have universally subscribed to the doctrine contained in the following citations:

PRESUMPTIONS AND CONSTRUCTION IN FAVOR OF CONSTITUTIONALITY

"The constitutionality of every statute is presumed, and it is the duty of the court to uphold

a statute wherever possible and every consideration of public need and public policy upon which Legislature could rationally have based legislation should be weighed by the court, and, if statute is not clearly arbitrary, unreasonable and capricious it should be upheld as constitutional."

State vs. Rones, 67 So. 2d. 99, 223 La. 839.
Michon vs. La. State Board of Optometry Examiners, 121 So. 2d. 565.

"The constitutionality of a statute is presumed and the burden of proof is on the litigant, who asserts to the contrary, to point out with utmost clarity wherein the constitution of the state or nation has been offended by the terms of the statute attacked."

Olivedell Planting Co. v. Town of Lake Providence, 47 So. 2d. 23, 217 La. 621.

"Presumption is in favor of constitutionality of a statute, and statute will not be adjudged invalid unless its unconstitutionality is clear, complete and unmistakable."

State ex rel Porterie v. Grosjean, 161 So. 871, 182 La. 298.

"The courts will not declare an act of the legislature unconstitutional unless it is shown that it clearly violates terms of articles of constitution."

Jones v. State Board of Ed. 53 So. 2d. 792, 219 La. 630.

"A legislative act is presumed to be legal until it is shown that it is manifestly unconsti-

tutional, and all doubts as to the validity are resolved in favor its constitutionality."

"The rule that a legislative act is presumed to be legal until it is shown to be manifestly unconstitutional is strictly observed where legislature has enacted a law in exercise of its police powers."

Board of Barber Examiners of La. v. Parker, 182 So. 485, 190 La. 314.

"Where a statute is attacked for discrimination or unreasonable classification doubts are resolved in its favor and it is presumed that the Legislature acts from proper motives in classifying for legislative purposes, and its classification will not be disturbed unless it is manifestly arbitrary and invalid."

State vs. Winehall & Rosenthal, 86 So. 781, 147 La. 781, Writ of Error dismissed (1922). Winehalld & Rosenthal vs. State Louisiana, 42 S. Ct. 313, 258 U. S. 605, 66 L. Ed. 786.

"In testing validity of a statute the good faith on part of Legislature is always presumed."

State vs. Saia, 33 So. 2d. 665, 212 La. 868.

"There is strong presumption Legislature understands and appreciates needs of people, and that its discriminations are based on adequate grounds."

Festervand v. Laster, 130 So. 635, 15 La. App. 159.

"A statute involving governmental matters will be construed more liberally in favor of its con-

stitutionality than one affecting private interests."

State ex rel LaBauve, v. Mitchel, 46 So. 430, 121 La. 374.

"State is not presumed to act arbitrarily in exercising police power."

State ex rel Porterie, Atty. Gen. v. Walmsley, 162 So. 826, 183 La. 139, Appeal dismissed Board of Liquidation v. Board of Com'rs. of Port of New Orleans, 56 St. Ct. 141, 296 U. S. 540, 80 L. Ed. 384, rehearing denied Board of Liquidation, City Debt of New Orleans v. Board of Comrs. of Port of New Orleans, 56 S. Ct. 246, 296 U. S. 663, 80 L. Ed. 473.

"Where a law is enacted under exercise or pretended exercise of police power and appears upon its face to be reasonable, burden is upon party assailing such law to establish that its provisions are so arbitrarily and unreasonable as to bring it within prohibition of Fourteenth Amendment, U.S.C.A. Const. Amend. 14".

State vs. Said, 33 So. 2d. 665, 212 La. 868.

"Act of Legislature is presumed to be legal, and the judiciary is without right to declare it unconstitutional unless that is manifest, and such rule is strictly observed in cases involving laws enacted in the exercise of the state's police power."

Schwegmann Bros. v. Louisiana Bd. of Alcohol Beverage Control, 43 So. 2d. 248, 216 La. 148, 14 A. L. R. 2d. 680.

L. S. A. - R. S. 14:59 (6) UNDER WHICH THE PROSECUTION IS BASED AND THE BILL OF INFORMATION FOUNDED THEREON, ARE SO VAGUE, INDEFINITE AND UNCERTAIN AS NOT TO ESTABLISH AN ASCERTAINABLE STANDARD OF GUILT?

Defendants' above stated complaint is without merit.

L.S.A.-R.S. 14:59 (6) under which defendants are charged reads as follows:

> "Criminal mischief is the intentional performance of any of the following acts: * * *
>
> (6) "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of said business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

The bill of information alleges:

> "* * * that on the 17th. of September, 1960, each did wilfully, unlawfully and intentionally take temporary possession of the lunch counter and restaurant of McCrory's Store, a corporation authorized to do business in the State of Louisiana, located at 1005 Canal Street, and did wilfully, unlawfully and intentionally remain in and at the lunch counter and restaurant in said place of business after Wendell Barrett the manager, a person in charge of said business, had ordered the said Sydney Langston Goldfinch, Jr., Rudolph Joseph

Lombard, Oretha Castle and Cecil Winston Carter, Jr., to leave the premises of said lunch counter and restaurant and to desist from the temporary possession of same, contrary, etc."

From the foregoing it will be seen that L.S.A.-R.S. 14:59 (6) as well as the bill of information filed thereunder, meet the constitutional rule governing the situation.

"When the meaning of a statute appears doubtful it is well recognized that we should seek the discovery of the legislative intent. *However, when the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no need for construction.*"

State v. Marsh, et. al. 96 So. 2d. 643, 233 La. 388.

State v. Arkansas Louisiana Gas Co., 78 So. 2d. 825, 227 La. 179.

"Meaning of statute must be sought in the language employed, and if such language be plain it is the duty of courts to enforce the law as written."

State ex rel LeBlanc v. Democratic Central Committee, 86 So. 2d. 192, 229 La. 556.

Texas Co. v. Cooper, 107 So. 2d. 676, 236 La. 380.

Beta Xi Chapter, etc. v. City of N. O., 137 So. 204, 18 La. App. 130.

Ramey v. Cudahy Packing Co., 200 So. 333.

"Statute, which describes indecent behaviour with juveniles as commission by anyone over 17,

of any lewd or lascivious act upon person or in presence of any child under age of 17, with intention of arousing or gratifying sexual desires of either person, which states that lack of knowledge of child's age shall not be a defense, and, which provides penalty therefor, sufficiently describes acts which constitute violation of statute and therefore, is constitutional. L. S A. - R. S. 14:81"

State v. Milford, 73 So. 2d. 778, 225 La. 611.

State v. Saibold, 213 La. 415, 34 So. 2d. 909.

State v. Prejean, 216 La. 1072, 45 So. 2d. 627.

"The statute defining the crime of simple escape from 'lawful custody' of official of state penitentiary or from any 'place where lawfully detained' uses the quoted words in their common or ordinary meanings and is not violative of state or federal constitutions in failing to define the terms. L.S.A.-R.S. 14:110, L.S.A.-Const. Art. 1, Sec. 10; U.S.C.A.-Const. Amend. 14"

State v. Marsh, 96 So. 2d. 643, 233 La. 388.

L. S. A. - R. S. 15:227 provides:

"The indictment must state every fact and circumstance necessary to constitute the offense, but it need do no more, and it is immaterial whether the language of the statute creating the offense, or words unequivocally conveying the meaning of the statute is used."

"Information charging defendant violated a specific statute in that he entered without authority a described structure, the property of a named person, with the intent to commit a theft therein, set forth each and every element of the crime of simple burglary and fully informed accused of the nature and cause of the accusation, and therefore, was sufficient."

State v. McCrory, 112 So. 2d. 432, 237 La. 747.

"Where affidavit charged defendant with selling beer to minors under 18 years of age in the language of the statute, and set all the facts and circumstances surrounding the alleged offense, so that court was fully informed of the offense charged for, the proper regulation of evidence sought to be introduced, and the accused was informed of the nature and cause of the accusation against her, and affidavit was sufficient to support a plea of former jeopardy, affidavit was sufficient to charge offense."

State v. Emmerson, 98 So. 2d. 225, 233 La. 885.

State v. Richardson, 56 So. 2d. 568, 220 La. 338.

L.S.A.-R.S. 14:59(6) upon which this prosecution is based is sufficient in its terms to notify all who may fall under its provisions as to what acts constitute a violation of the law, and the bill of information meets fully the requirements of the law.

THE BILL OF INFORMATION ON WHICH THE PROSECUTION IS BASED, DOES NOTHING MORE THAN SET FORTH A CONCLUSION OF LAW, AND DOES NOT STATE WITH CERTAINTY AND SUFFICIENT CLARITY THE NATURE OF THE ACCUSATION?

There is no merit to this contention.

As has been heretofore shown, the bill of information states "facts and circumstances" in compliance with the Constitutional mandate, L.S.A.-R.S. 15:227, and the decisions of the Supreme Court. The words used in describing the offense are those of L.S.A.-R.S. 14:59(6), and are not conclusions of law by pleader.

> "Information for taking excess amount of gas from well held not to state mere conclusions, where showing amount allowed and amount taken. Act No. 252, of 1924, sec. 4, subd. 2."
>
> State v. Carson Carbon Co., 111 So. 162, 162 La. 781.

L.S.A.-R.S. 14:59 (6) DEPRIVES DEFENDANTS OF EQUAL PROTECTION OF THE LAW IN THAT IT EXCLUDES FROM ITS PROVISIONS OF A CERTAIN CLASS OF CITIZENS, NAMELY THOSE WHO AT THE TIME ARE ACTIVE WITH OTHERS IN FURTHERANCE OF CERTAIN UNION (LABOR) ACTIVITIES?

The court is unable to relate this contention to the provisions of L.S.A.-R.S. 14:59(6), or the bill of information filed thereunder.

No where in the statute is any reference made to labor union activities, nor does the statute make any exceptions or exclusions as to any persons or class of citizens, labor unions, or otherwise. It is probable that defendants have erroneously confused these proceedings with a charge under L.S.A.-R.S. 14:103 (Disturbance of the Peace.)

THE DEFENDANTS ARE BEING DEPRIVED OF THEIR RIGHTS UNDER THE "EQUAL PROTECTION AND DUE PROCESS" CLAUSES OF BOTH THE CONSTITUTION OF LOUISIANA AND OF THE UNITED STATES OF AMERICA, IN THAT THE SAID LAW UNDER WHICH THE BILL OF INFORMATION IS FOUNDED IS BEING ENFORCED AGAINST THEM ARBITRARILY, CAPRICIOUSLY AND DISCRIMINATELY, IN THAT IT IS BEING APPLIED AND ADMINISTERED UNJUSTLY AND ILLEGALLY, AND ONLY AGAINST PERSONS OF THE NEGRO RACE AND OR WHITE PERSONS WHO ACT IN CONCERT WITH MEMBERS OF THE NEGRO RACE?

The prosecution of defendants is in the name of the State of Louisiana, through the District Attorney for the Parish of Orleans. This officer is vested with absolute discretion as is provided by L.S.A.-R.S. 15:17.

It reads as follows:

> "The district attorney shall have entire charge and control of every criminal prosecution instituted or pending in any parish wherein he is district attorney, and shall determine whom, when, and how he shall prosecute, etc."

In the case of State v. Jourdain, 71 So. 2d. 203, 225 La. 1030, it was claimed in a motion to quash that the narcotic law was being administered by the New Orleans Police Department and the District Attorney's Office in a manner calculated to deprive the defendant of the equal protection of the law, and in violation of Section 1 of the 14th. Amendment of the Constitution of the United States, in that these officials were actively prosecuting the infraction in this case, whereas they refrained from prosecuting other violations of the narcotic act of a more serious nature.

In sustaining the trial court's ruling, Your Honors said:

> "The claim is untenable. Seemingly, it is the thought of counsel that the failure of the Police Department and the District Attorney to offer appellant immunity, if he would become an informer, operates as a purposeful discrimination against him and thus denies him an equal protection of the law. But, if we conceded that the police and the district attorney have failed to prosecute law violators who have agreed to become informers, this does not either constitute an unlawful administration of the statute or evidence as intentional or purposeful discrimination against appellant. The matter of the prosecution of any criminal case is within the entire control of the district attorney (R.S. 15:17) and the fact that not every violator has been prosecuted is of no concern of appellant, in the absence of an allegation that he is a mem-

ber of a class being prosecuted solely because of race, religion, color or the like, or that he alone is the only person who has been prosecuted under the statute. Without such charges his claim cannot come within that class of unconstitutional discrimination which was found to exist in Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 and McFarland v. American Sugar Ref. Co., 241 U. S. 79, 60 L. Ed. 899, 36 S. Ct. 498. See Snowden v. Hughes, 321 U. S. 1, 88 L. Ed. 497, 64 S. Ct. 397, and cases there cited."

In the case of City of New Orleans versus Dan Levy, et. al., 233 La. 844, 98 So. 2d. 210, Justice McCaleb in concurring stated:

"I cannot agree that the City of New Orleans and the Vieux Carre Commission are or have been applying the ordinances involved with "an evil eye and an unequal hand, so as to practically make unjust and illegal discriminations between persons in similar circumstances" (see Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 1073, 30 L. Ed. 220) and have thus denied to appellant an equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution.'

The sum and substance of appellant's charges is that his constitutional rights have been violated since many other similar or more severe violations of the city ordinances exist and that the city officials have permitted such violations by not taking any action to enforce the law. These

complaints, even if established, would not be sufficient in my opinion to constitute an unconstitutional denial of equal protection to appellant as it is the well-settled rule of the Supreme Court of the United States and all other state courts of last resort that the constitutional prohibition embodied in the equal protection clause applies only to discriminations which are shown to be of an intentional, purposeful or systematic nature. Snowden v. Hughes, 321 U. S. 1, 9, 64 S. Ct. 397, 88 L. Ed. 497, 503; Charleston Federal Savings & Loan Ass'n. v. Alderson, 324 U. S. 182, 65 S. Ct. 624, 89 L. Ed. 857; City of Omaha v. Lewis & Smith Drug Co., 156 Neb 650, 57 N. W. 2d. 269; Zorach v. Clauson, 303 N. Y. 161, 100 N. E. 2d. 463; 12 Am Jur. Section 566 and State v. Anderson, 206 La. 986, 20 So. 2d. 288.

In State v. Anderson, this court quoted at length from the leading case of Snowden v. Hughes, supra, (321 U. S. 1, 9, 64 S. Ct. 401) where the Supreme Court of the United States expressed at some length the criteria to be used in determining whether an ordinance or statute, which is claimed to have been unequally administered, transgresses constitutional rights. The Supreme Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with

respect to a particular class or person, of McFarland v. American Sugar Refining Co., 241 U. S. 79, 86, 87, 36 S. Ct. 498, 501, 60 L. Ed. 899 (904), or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 U. S. 356, 373, 374, 6 S. Ct. 1064, 1072, 1073, 30 L. Ed. 220 (227, 228). But a discriminatory purpose is not presumed. Tarrance v. State of Florida, 188 U. S. 519, 520, 23 St. Ct. 402, 403, 47 L. Ed. 572 (573); there must be a showing of 'clear and intentional discrimination', Gundling v. City of Chicago, 177 U. S. 183, 186, 20 S. Ct. 633, 635, 44 L. Ed. 725 (728); see Ah Sin v. Wittman, 198 U. S. 500, 507, 508, 25 S. Ct. 756, 758, 759, 49 L. Ed. 1142 (1145, 1146); Bailey v. State of Alabama, 219 U. S. 219, 231, 31 S. Ct. 145, 147, 55 L. Ed. 191 (197). Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. Neal v. State of Delaware, 103 U. S. 370, 394, 397, 26 L. Ed. 567 (573, 574); Norris v. State of Alabama, 294 U. S. 587, 589, 55 S. Ct. 579, 580, 79 L. Ed. 1074 (1076); Pierre v. State of Louisiana, 306 U. S. 354, 357, 59 S. Ct. 536, 538, 83 L. Ed. 757, (759); Smith v. State of Texas, 311 U. S. 128, 130, 131, 61 S. Ct. 164, 165, 85 L. Ed. 84 (86, 87); Hill v. State of Texas, 316 U. S. 400, 404, 62 S. Ct. 1159, 1161, 86 L. Ed. 1559 (1562). But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing

of actual discrimination because of race. State of Va. v. Rives, 100 U. S. 313, 322, 323, 25 L. Ed. 667, (670, 671) Martin v. State of Texas, 200 U. S. 316, 320, 321, 26 S. Ct. 338, 339, 50 L. Ed. 497 (499); Thomas v. State of Texas, 212 U. S. 278, 282, 29 S. Ct. 393, 394, 53 L. Ed. 512 (514); cf. Williams v. State of Mississippi, 170 U. S. 213, 225, 18 S. Ct. 583, 588, 42 L. Ed. 1012 (1016).

"Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by ... assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of the law is the same as though the discrimination were incorporated in and proclaimed by the statute. Coulter v. Louisville & N. R. Co., 196 U. S. 599, 608, 609, 610, 25 St. Ct. 342, 343, 344, 345, 49 L. Ed. 615 (617, 618); Chicago B & Q R Co., v. Babcock, 204 U. S. 585, 597, 27 St. Ct. 326, 328, 51 L. Ed. 636 (640); Sunday Lake Iron Co. v. Wakefield Twp. 247 U. S. 350, 353, 38 St. Ct. 495, 62 L. Ed. 1154 (1156); Southern R. Co. v. Watts, 260 U. S. 519, 526, 43 S. Ct. 192, 195, 67 L. Ed. 375 (387). Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is

neither systematic nor long continued. Cf. McFarland v. American Sugar Refining Co. (241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899) supra.

"The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the approbrious epithets 'willful' and 'malicious' * * * *" "

On rehearing in the Levy Case, Mr. Justice Simon, speaking for the Court said:

"In the instant case there is no proof that in the enforcement of the municipal zoning and Vieux Carre ordinances that the City acted with a deliberate discriminatory design, intentionally favoring one individual or class over another. It is well accepted that a discriminatory purpose is never presumed and that the enforcement of the laws by public authorities vested, as they are with a measure of discretion will, as a rule, be upheld."

Applying the cases herein cited, to the proof adduced by defendants in support of their claim of unjust, illegal, and discriminatory administration of L.S.A.-R.S. 14:59 (6), defendants have failed to sustain their burden.

The claim is without merit.

L.S.A.-R.S. 14:59(6) UNDER WHICH THE DEFENDANTS ARE CHARGED IS UNCONSTITUTIONAL AND IN CONTRAVENTION OF THE 14TH AMENDMENT OF THE CONSTITUTION OF THE UNITED

STATES, AND IN CONTRAVENTION OF THE CONSTITUTION OF LOUISIANA, IN THAT IT WAS ENACTED FOR THE SPECIFIC PURPOSE AND INTENT TO IMPLEMENT AND FURTHER THE STATE'S POLICY OF ENFORCED SEGREGATION OF RACES?

This contention of defendants is without merit.

Certainly under its police power the legislature of the state was within its rights to enact L.S.A.-R.S. 14:59(6).

What motives may have prompted the enactment of the statute is of no concern of the courts. As long as the legislature complied with the constitutional mandate concerning legislative powers and authority, this was all that was required.

> "It has been uniformly held that every reasonable doubt should be resolved in favor of the constitutionality of legislative acts. We said in State ex rel. Knox v. Board of Supervisors of Grenada County, 141 Miss. 701, 105 So. 541, in a case involving Section 175 of the Mississippi Constitution, that if systems (acts) of the kind here involved are evil, or if they destroy local government in the counties and municipalities, that is a question to be settled at the ballot boxes between the people and the Legislature. And whether the law is needed or not, or whether it is wise or not, cannot be settled here. Our functions are to decide whether the Legislature had the power to act in

passing the law and not whether it ought to have acted in the manner it did. The court will uphold the constitution in the fullness of its protection, but it will not and cannot rightfully control the discretion of the Legislature within the field assigned to it by the Constitution."

State of Mississippi ex rel. Joe T. Patterson, Attorney General v. Board of Supervisors of Prentiss County, Miss. 105 So. 2d. 154, (Mississippi)

"The state, in the brief of its counsel, argues: 'If we assume that R. S. 56:131 et sequor must be followed —— then there can be no enforcement of the fish and game laws by the criminal courts. Only a $25 penalty can be inflicted against a person who is apprehended for wilfully killing a doe deer. Certainly this small 'civil' penalty will not deter willful game violators and our deer population will soon be decimated. * * *' Whether the prescribed civil proceeding with its attendant penalty militates against adequate wild life protection is not for the courts' determination. The question is one of policy which the lawmakers must resolve."

State v. Coston, 232 La. 1019, 95 So. 2d. 641.

"We should also retain in our thinking the proposition that the regulation and control of the alcoholic beverage business is peculiarly a legislative function. In this connection, as in all similar situations, when the legislative branch of the government exercises a legislative power in the form of

a duly enacted statute or ordinance it is not the function of a court to explore the wisdom or advisability of the enactment in order to bring its enforcement into question. To this end the limits of the court's authority is to measure the validity of the legislative enactment by the requirements of the controlling law. If those standards are met the legislation should be upheld. Somlyo v. Schott, supra."

State v. Cochran, 114 So. 2d. 797 (Fla.)

"In Morgan County v. Edmonson, 238 Ala. 522, 192 So. 274, 276, we said:

> 'It is of course a well settled rule that in determining the validity of an enactment, the judiciary will not inquire into the motives or reasons of the Legislature or the members thereof. 16 C.J.S., Constitutional Law, pp. 154, p. 487. 'The judicial department cannot control legislative discretion, nor inquire into the motives of legislators.' City of Birmingham v. Henry, 224 Ala. 239, 139 So. 283. See also, State ex rel Russum v. Jefferson County Commission, 224 Ala. 229, 139 So. 243; *****'

It is our solemn duty to uphold a law which has received the sanction of the Legislature, unless we are convinced beyond a reasonable doubt of its unconstitutionality. Yielding v. State ex rel. Wilkinson, 232 Ala. 292, 167 So. 580."

State v. Hester, 72 So. 2d. 61 (Ala.)

"Another factor which fortifies our view is this: the act assaulted is a species of social legis-

lation, that is, a field in which the legislative power is supreme unless some specific provision of organic law is transgressed. Absent such transgression it is for the legislature and not the courts to determine what is "unnecessary, unreasonable, arbitrary and capricious'. Requiring hotels, motels, and other rooming houses to advertise full details of room charges if they exercise that medium is certainly a legislative prerogative with which the courts have no power to interfere. A legislative finding that such a requirement is in the public interest concludes the matter."

Adams v. Miami Beach Hotel Association, 77 So. 2d. 465, (Fla.)

"Statute is not unconstitutional merely because it offers an opportunity for abuses."

James v. Todd (Ala) 103 So. 2d. 19. Appeal dismissed 79 S. Ct. 288, 358 U.S. 206, 3 L. Ed. 2d. 235.

"Validity of law must be determined by its terms and provisions, not manner in which it might be administered, operated or enforced."

Clark v. State (Miss) 152 So. 820.

"The state legislature is unrestricted, save by the state or federal constitution, and a statute passed by it, in the exercise of the powers, the language of which is plain, must be enforced, regardless of the evil to which it may lead."

State v. Henry (Miss) 40 So. 152, 5 L.R.A. N. S. 340.

"If the power exists in the legislative department to pass an act, the act must be upheld

by the court, even though there may be a possibility of administration abuse."

Stewart v. Mack (Fla) 66 So. 2d. 811.

"The gravamen of the offense denounced by section 3403 is the entry by one upon the enclosed land or premises of another occupied by the owner or his employees after having been forbidden to enter, or not having been previously forbidden refusing to depart therefrom after warned to do so."

* * * * * * *

"It is contended that the statute is invalid because it is apparent that its terms are for the protection of the lessor in the enjoyment of his property. Conceding that to be true, we find no reason for the deduction that the statute is therefore invalid. All statutes against trespass are primarily for the protection of the individual property owner, but they are also for the purpose of protecting society against breaches of the peace which might occur if the owner of the property is required to protect his rights by force of arms."

Coleman, Sheriff v. State ex rel Carver (Fla.) 161 So. 89.

L.S.A.-R.S. 14:59(6) EXCEEDS THE POLICE POWER OF THE STATE, IN THAT IT HAS NO REAL, SUBSTANTIAL OR RATIONAL RELATION TO THE PUBLIC SAFETY, HEALTH, MORALS, OR GENERAL WELFARE, BUT HAS FOR ITS PURPOSE AND OBJECT, GOVERNMENTALLY SPONSORED AND ENFORCED SEPARATION OF RACES, THUS DENYING

DEFENDANTS THEIR RIGHTS UNDER THE FIRST, THIRTEENTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION 2 OF THE LOUISIANA CONSTITUTION?

THE REFUSAL TO GIVE SERVICE SOLELY BECAUSE OF RACE THE ARREST AND SUBSEQUENT CHARGE ARE ALL UNCONSTITUTIONAL ACTS IN VIOLATION OF THE 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, IN THAT THE ACT OF THE COMPANY'S REPRESENTATIVE WAS NOT THE FREE WILL ACT OF A PRIVATE INDIVIDUAL, BUT RATHER AN ACT WHICH WAS ENCOURAGED, FOSTERED AND PROMOTED BY STATE AUTHORITY IN SUPPORT OF A CUSTOM AND POLICY OF ENFORCED SEGREGATION OF RACE AT LUNCH COUNTERS?

THE ARREST, CHARGE AND PROSECUTION OF THE DEFENDANTS ARE UNCONSTITUTIONAL, IN THAT IT IS THE RESULT OF STATE AND MUNICIPAL ACTION, THE PRACTICAL EFFECT OF WHICH IS TO ENCOURAGE AND FOSTER DISCRIMINATION BY PRIVATE PARTIES?

The Court has grouped together for discussion the propositions hereinabove enumerated as they appear to be related to each other in the sum total of defendants complaint of the unconstitutionality of L.S.A.-R.S. 14:59(6).

There is presently no anti-discrimination statute in Louisiana. Sections 3 and 4 of Title 4 of the Revised

Statutes having been repealed by Act 194 of 1954. Nor is there any legislation compelling the segregation of the races in restaurants, or places where food is served.

As authority supporting the constitutionality of L.S.A.-R.S. 14:59(6), the following cases are cited:

In the case of State v. Clyburn, et al., (N.C.) 1958, 101 S. E. 2d. 295, the defendants, a group of Negroes led by a minister, entered a Durham, North Carolina, ice cream and sandwich shop which was separated by a partition into two parts marked "White" and "Colored". They proceeded to the portion set apart for white patrons and asked to be served. Service was refused and the proprietor asked them to leave, or to move to the section marked "Colored." The minister asserted religious and constitutional bases for remaining. A city police officer placed them under arrest. The defendants were tried and convicted on warrants charging violation of state statutes which impose criminal penalties upon persons interfering with the possession of privately-held property. On appeal the Supreme Court of North Carolina affirmed the conviction. Finding no "state action" within the prohibition of the Fourteenth Amendment, the Court held that the Constitutional rights of defendants had not been infringed by refusing them service or by their subsequent arrest.

In resolving the question, "Must a property owner engaged in a private enterprise submit to the use of his property to others simply because they are members of a different race, "the Supreme Court of North Carolina said:

"The evidence shows the partitioning of the building and provision for serving members of the different races in differing portions of the building was the act of the owners of the building, operators of the establishment. Defendants claim that the separation by color for service is a violation of their rights guaranteed by the Fourteenth Amendment to the Constitution of the United States."

* * * * * *

"Our statutes, G. S. Para. 14-126 and 134, impose criminal penalties for interfering with the possession or right of possession of real estate privately held. There statutes place no limitation on the right of the person in possession to object to a disturbance of his actual or constructive possession. The possessor may accept or reject whomsoever he pleases and for whatsoever whim suits his fancy. When that possession is wrongfully disturbed it is a misdemeanor. The extent of punishment is dependent upon the character of the possession, actual or constructive, and the manner in which the trespass is committed. Race confers no prerogative on the intruder; nor does it impair his defense.

The Fourteenth Amendment to the Constitution of the United States created no new privileges. It merely prohibited the abridgment of existing privileges by state action and secured to all citizens the equal protection of the laws.

Speaking with respect to rights then asserted, comparable to rights presently claimed, Mr. Justice Bradley, in the Civil Rights Cases, 109

U. S. 3, 3 S.Ct. 18, 21, 27 L. Ed. 835, after quoting the first section of the Fourteenth Amendment, said: 'It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this, but, in order that the national will, thus declared, may not be a mere brutum fulmen the last section of the amendment invests congress with power to enforce it by appropriate legislation. To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon congress, and this is the whole of it. It does not invest congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are

undoubtedly secured by the fourteenth amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to congress to legislate for the purpose of carrying such prohibition into effect; and such legislation must necessarily be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect.'

In United States v. Harris, 106 U. S. 629, 1 S. Ct. 601, 609, 27 L. Ed. 290, the Court, quoting from United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588 said: 'The fourteenth amendment prohibits a state from depriving any person of life, liberty, or property without due process of law, or from denying to any person the equal protection of the laws; but this provision does not add anything to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the states upon the fundamental rights which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the states, and it remains there. The only obligation resting upon the United States is to see that the states do not deny the right. The power of the national government is limited to this guaranty.'

More than half a century after these cases were decided the Supreme Court of the United States said in Shelley v. Kraemer, 334 U. S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d. 441: 'Since

the decision of this Court in the Civil Rights Cases, 1883, 109 U. S. 3, 3 S. Ct. 18, 27 L. Ed. 835, the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' This interpretation has not been modified: Collins v. Hardyman, 341 U. S. 651, 71 S. Ct. 937, 95 L. Ed. 1253; District of Columbia v. Thompson Co., 346 U. S. 100, 73 S. Ct. 1007, 97 L. Ed. 1480; Williams v. Yellow Cab Co., 3 Cir. 200 F. 2d. 302, certiorari denied Dargan v. Yellow Cab Co., 346 U. S. 840, 74 S. Ct. 52, 98 L. Ed. 361.

Dorsey v. Stuyvesant Town Corp., 299 N. Y. 512, 87 N. E. 2d. 541, 14 A. L. R. 2d. 133, presented the right of a corporation, organized under the New York law to provide low cost housing, to select its tenants, with the right to reject on account of race, color, or religion. The New York Court of Appeals affirmed the right of the corporation to select its tenants. The Supreme Court of the United States denied certiorari, 339 U. S. 981, 70 S. Ct. 1019, 94 L. Ed. 1385.

The right of an operator of a private enterprise to select the clientele he will serve and to make such selection based on color, if he so desires, has been repeatedly recognized by the appellate courts of this nation. Madden v. Queens County Jockey Club, 269 N. Y. 249, 72 N. E. 2d. 697, 1 A. L. R. 2d. 1160; Terrell Wells Swimming Pool

v. Rodriguez Tex. Civ. App. 182 S. W. 2d. 824; Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L. R. A., N. S. 447; Younger v. Judah, 111 Mo. 303, 19 S. W. 1109; Goff v. Savage, 122 Wash. 194, 210 P. 374, De La Ysla v. Publix Theatres Corporation, 82 Utah 598, 26 P. 2d. 818; Brown v. Meyer Sanitary Milk Co., 150 Kan. 931, 96 P. 2d. 651;

Horn v. Illinois Cent. R. Co., 327 Ill. App. 498, 64 N. E. 2d. 574; Coleman v. Middlestaff, 147 Cal. App. 2d. Supp. 833, 305 P. 2d. 1020; Fletcher v. Coney Island, 100 Ohio App. 259, 136 N. E. 2d. 344; Alpaugh v. Wolverton, 184 Va. 943, 36 S. E. 2d. 906. The owner-operator's refusal to serve defendants, except in the portion of the building designated by him, impaired no rights of defendants.

The fact that the proprietors of the ice cream parlor contributed to the support of local government and paid a license or privilege tax which license contained no restrictions as to whom the proprietors could serve cannot be construed to justify a trespass, nor is there merit in the suggestion that the complaint on which the warrant of arrest issued, signed by an officer charged with the duty of enforcing the laws, rather than by the injured party, constituted state action denying privileges guaranteed to the defendants by the Fourteenth Amendment. The crime charged was committed in the presence of the officer and after a respectful request to desist. He had a right to arrest. G. S. Par. 15-41.

Screws v. United States, 325 U. S. 91, 65 S. Ct. 1031, 85 L. Ed. 1368; and State v. Scoggin, 236 N. C. 19, 72 S. E. 2d. 54, cited and relied upon by defendants, appellants, to support their position, have no factual analogy to this case. Nothing said in those cases in any way supports the position taken by defendants in this case."

In the case of Browning v. Slenderella Systems of Seattle, (Wash) (1959), 341 P. 2d. 859, two justices of the Supreme Court of Washington dissented in a ruling of that court holding a reducing salon came within the purview of an Anti-Discrimination Statute of that State.

In their dissent it was said:

"Because respondent is a Negress, the Slenderella Systems of Seattle, a private enterprise, courteously refused to give her a free reducing treatment, as advertised. She thereupon became abusive and brought this civil action for the injury to her feelings caused by the racial discrimination.

This is the first such action in this state. In allowing respondent to maintain her action, the majority opinion has stricken down the constitutional right of all *private* individuals of every race to choose with whom they will deal and associate in their *private* affairs.

No sanction for this result can be found in the recent segregation cases in the United States supreme court involving Negro rights in public schools and public busses. These decisions were predicated upon section 1 of the fourteenth amend-

ment to the United States constitution, which reads:

> 'All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the *privileges* or *immunities* of citizens of the United States: nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the *equal* protection of the laws." (Italics mine.)

In the pre-Warren era, the courts had held that the privileges of Negroes under the fourteenth amendment, supra, were not *abridged* if they had available to them public services and facilities of *equal quality* to those enjoyed by white people. The Warren antisegregation rule abandoned that standard and substituted the unsegregated enjoyment of public services and facilities as the sole test of Negro equality before the law in such public *institutions*.

The *rights* and *privileges* of the fourteenth amendment, supra, as treated in the segregation decisions and as understood by everybody, related to *public institutions* and *public utilities* for the obvious reason that no person, whether white, black, red, or yellow, has any right whatever to compel another to do business with him in his *private* affairs.

No public institution or public utility is involved in the instant case. The Slenderella enterprise was not established by law to serve a public purpose. It is not a *public* utility with monopoly prerogatives granted to it by franchise in exchange for an unqualified obligation to serve everyone alike. Its employees are not public servants or officers. It deals in *private personal services*. Its business, like most service trades, is conducted pursuant to informal contracts. The fee is the consideration for the service. It is true the contracts are neither signed, sealed, nor reduced to writing. They are contracts, nevertheless, and, as such, must be voluntarily made and are then, and only then, mutually enforceable. Since either party can refuse to contract, the respondent had no more right to compel service than Slenderella had to compel her to patronize its business.

There is a clear distinction between the nondiscrimination enjoined upon a public employee in the discharge of his official duties, which are prescribed by laws applicable to all, and his unlimited freedom of action in his private affairs. There is no analogy between a public housing project operated in the government's proprietary capacity, wherein Negroes have equal rights, and a private home where there are no public rights whatever and into which even the King cannot enter.

No one is obliged to rent a room in one's home; but, if one chooses to operate a boarding house therein, it can be done with a clientele selected according to the taste or even the whim of

the landlord. This right of discrimination in private businesses is a constitutional one.

"The ninth amendment of the United States constitution specifically provides:

> 'The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people.'

All persons familiar with the rights of English speaking peoples know that their liberty inheres in the scope of the individual's right to make uncoerced choices as to what he will think and say; to what religion he will adhere; what occupation he will choose; where, when, how and for whom he will work, and generally to be free to make his own decisions and chooses his course of action in his private civil affairs. These constitutional rights of law-abiding citizens are the every essence of American liberties. For instance, they far outweigh in importance the fifth amendment to the United States constitution which excuses criminals from giving evidence against themselves. It was, in fact, an afterthought. Our constitutional forefathers were chiefly concerned with the rights of honest men. They would have specified their rights with the same particularity that they did in regard to criminals if they had foreseen that courts would become unfamiliar with them.

Cash registers ring for a Negro's as well as for a white man's money. Practically all American businesses, excepting a few having social overtones or involving personal services, actively seek

Negro patronage for that rea on. The few that do not serve Negroes adopt that policy either because their clientele insist upon exclusiveness, or because of the reluctance of employees to render intimate personal service to Negroes. Both the clientele and the business operator have a constitutional right to discriminate in their private affairs upon any conceivable basis. The right to exclusiveness, like the right to privacy, is essential to freedom. No one is legally aggrieved by its exercise.

No sanction for destroying our most precious heritage can be found in the *criminal* statute cited by the majority opinion. It does not purport to create a civil cause of action. The statute refers to "places of *public* resort". (Italics mine). This phrase is without constitutional or legal significance. It has no magic to convert a *private* business into a governmental institution. If one man a week comes to a tailor shop, it is a place of *public resort*, but that does not make it a public utility or public institution, and the tailor still has the right to select his private clientele if he chooses to do so. As a matter of fact, the statute in question is not even valid as a criminal statute. Obviously, this is not the occasion, however, to demonstrate its unconstitutionality.

The majority opinion violates the thirteenth amendment to the United States constitution. It provides, inter alia:

"Neither slavery *nor involuntary servitude* • • • shall exist within the United States • • •" (Italics mine)

Negroes should be familiar with this amendment. Since its passage, they have not been compelled to serve any man against their will. When a white woman is compelled against her will to give a Negress a Swedish massage, that too is involuntary servitude. Henderson v. Coleman, 150 Fla. 185, 7 So. 2d. 177.

Through what an arc the pendulum of Negro rights has swung since the extreme position of the Dred Scott decision: Those rights reached dead center when the thirteenth amendment to the United States constitution abolished the ancient wrong of Negro slavery. This court has now swung to the opposite extreme in its opinion subjecting white people to "involuntary servitude" to Negroes. I dissent."

In the case of Williams versus Howard Johnson's Restaurant, (Va.) (1959), U. S. C. A. 4th. Cir., F. 2d. 845, a Negro attorney brought a class action in federal court against a restaurant located in Alexandria, Virginia seeking a declaratory judgment that a refusal to serve him because of race, violated, the Civil Rights Act of 1875, etc.

On appeal, the Court of Appeals for the Fourth Circuit affirmed the lower court's dismissal for want of of jurisdiction and failure to state a cause of action, on the ground that defendant's restaurant, could refuse service to anyone, not being a facility of interstate commerce,

and that the Civil Rights Act of 1875, did not embrace actions of individuals. Further, that as an instrument of local commerce, it was at liberty to deal with such persons as it might select.

The court said:

"Section 1 and 2 of the Civil Rights Act of 1875, upon which the plaintiff's position is based in part, provided that all persons in the United States should be entitled to the full and equal enjoyment of accommodations, advantages, facilities and privileges of inns, public conveyances and places of amusement, and that any person who should violate this provision by denying to any citizen the full enjoyment of any of the enumerated accommodations, facilities or privileges should for every such offense forfeit and pay the sum of $500 to the person aggrieved. The Supreme Court of the United States, however, held in Civil Rights Cases, 109 U. S. 3, that these sections of the Act were unconstitutional and were not authorized by either the Thirteenth or Fourteenth Amendments of the Constitution. The court pointed out that the Fourteenth Amendment was prohibitory upon the states only, so as to invalidate all state statutes which abridge the privileges or immunities of citizens of the United States or deprive them of life, liberty or property without due process of law, or deny to any person the equal protection of the laws; but that the amendment did not invest Congress with power to legislate upon the actions of individuals, which are within the domain of state

legislation. The Court also held that the question whether Congress might pass such a law in the exercise of its power to regulate commerce was not before it, as the provisions of the statute were not conceived in any such view (109 U. S. 19). With respect to the Thirteenth Amendment, the Court held that the denial of equal accommodations in inns, public conveyances and places of amusement does not impose the badge of slavery or servitude upon the individual but, at most infringes rights protected by the Fourteenth Amendment from state aggression. It is obvious, in view of that decision, that the present suit cannot be sustained by reference to the Civil Rights Act of 1875.

The plaintiff concedes that no statute of Virginia requires the exclusion of Negroes from pubic restaurants and hence it would seem that he does not rely upon the provisions of the Fourteenth Amendment which prohibits the states from making or enforcing any law abridging the privileges and immunities of citizens of the United States or denying to any person the equal protection of the law. He points, however, to statutes of the state which requires the segregation of races in the facilities furnished by carriers and by persons engaged in the operation of places of public assemblage; he emphasizes the long established local custom of excluding Negroes from public restaurants and he contends that the acquiescence of the state in these practices amounts to discriminatory state action which falls within the condemnation of the Constitution. The essence of the argument is that the

state licenses restaurants to serve the public and thereby is burdened with the positive duty to prohibit unjust discrimination in the use and enjoyment of the facilities.

This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices. Unless these actions are performed in obedience to some positive provision of state law they do not furnish a basis for the pending complaint. The license laws of Virginia do not fill the void. Section 35-26 of the Code of Virginia, 1950, makes it unlawful for any person to operate a restaurant in the state without an unrevoked permit from the Commissioner, who is the chief executive officer of the State Board of Health. The statute is obviously designed to protect the health of the community but it does not authorize state officials to control the management of the business or to dictate what persons shall be served. The customs of the people of the state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelly v. Kraemer, 334 U. S. 1; 68 S. Ct. 836, 842:

> 'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. 3 * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only*

such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful. (Emphasis supplied.)"

In the case of State of Maryland versus Drews, Et. Als., Cir. Court for Baltimore Co. (May 6, 1960). (Race Relations Law Reporter, Vol. 5, No. 2, Summer—1960) five persons, three white and two Negro, were prosecuted in the Baltimore County, Maryland Circuit Court on the statutory charge of disturbing the peace. It was found that defendants had on the date of their arrest entered an amusement park owned by a private corporation, which unknown to defendants, had a policy of not serving colored persons. A special officer employed by the corporate owners informed defendants of the policy and asked the two colored defendants to leave. When they refused, all five defendants were requested to leave, but all refused. Baltimore County police who were then summoned to the area repeated the requests; but defendants again refused to leave; that over the physical resistance of defendants, they were arrested and removed from the premises.

The Court held: (1) that the park owner, though corporately chartered by the state and soliciting public patronage, could 'arbitrarily restrict (the park's) use to invitees of his selection' etc. * * * (3) that such action occurred in a 'place of public resort or amusement' within terms of the statute allegedly violated, the quoted phrase clearly applying to all places where some segment of the public habitually gathers, and not merely to publicly

owned places where all members of the public without exception are permitted to congregate.

The Court said:

"The first question which arises in the case is the question whether an owner of private property to which substantial numbers of persons are invited has any right to discriminate with respect to persons invited thereon, that is to say, whether such owner may exercise his own arbitrary freedom of selection in determining who will be admitted to and who will be permitted to remain upon his property under circumstances where such private property is being used as a place of resort or amusement. This question has been clearly answered in the affirmative by the authorities. In Madden v. Queens County Jockey Club, 72 N. E. 2d. 697 (Court of Appeals of New York), it was said at Page 698:

'At common law a person engaged in a public calling such as innkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises, such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. * * * * *

'The common-law power of exclusion, noted above, continues until changed by legislative enactment.'

The ruling therein announced was precisely adopted in the case of Greenfield v. Maryland Jockey Club, 190 Md. 96, the Court of Appeals, stating at Page 102 of its opinion that:

> 'The rule that, except in cases of common carriers, innkeepers and similar public callings, one may choose his customers is not archaic.'

The Court of Appeals also carefully pointed out in the Greenfeld case that the rule of the common law is not altered even in the case of a corporation licensed by the State of Maryland. The doctrine of the Madden and Greenfeld cases, supra, announced as existing under the common law, has been held valid, even where the discrimination was because of race or color. See Williams v. Howard Johnson Restaurant, 268 F. 2d. 845 (restaurant) (CCA 4th); Slack v. Atlantic White Tower Systems, Inc., No. 11073 U.S.D.C. for the District of Maryland, D. R. et. al. Thomsen, J. (restaurant); Hackley v. Art Builders, Inc. et al (U.S.D.C.) for the District of Maryland, D. R. January 16, 1960 (real estate development).

The right of an owner of property arbitrarily to restrict its use to invitees of his selection is the established law of Maryland. Changes in the rule of law conferring that right are for the legislative and not the judicial branch of government.

We pass then to the second question: Did such action occur at a place of public resort or amusement? This involves a determination of the legislative meaning of the expression "place of

public resort or amusement". If the legislative intent was that the words were intended to apply only to publicly owned places of resort or amusement, then, manifestly, the testimony would not support a conviction here. By the same token, if the expression was intended to apply only to places in which all members of the public without exception were authorized or permitted to congregate, again there would be no evidence to support conviction here. On the other hand, if the reasonable intent and purpose of the quoted phrase was to prohibit disorderly conduct in a place where some segment of the public habitually gathers and congregates, the evidence would clearly justify a conviction.

The first suggested interpretation of the words must be rejected, because of the fact that the same statute uses the term 'public worship', and this fact utterly destroys a contention that the word 'public' has a connotation of public ownership because of our constitutional separation of church and state.

The second suggested interpretation is equally invalid, because its effect, in the light of the rule of law announced in the Greenfeld case, supra, would be the precise equivalent of the first suggested interpretation of the phrase. Moreover, such an interpretation necessarily would mean that the police authorities would be powerless to prevent disorder or bring an end to conditions of unrest and potential disturbance where large numbers of the public may be in congregation. To suggest such an interpretation is to refute it.

In the opinion of this Court the statute has clear application to any privately owned place, where crowds of people other than the owner of the premises habitually gather and congregate, and where, in the interest of public safety, police authorities lawfully may exercise their function of preventing disorder. See Askew v. Parker, 312 P. 2d. 342 (California). See also State v. Lanouette, 216 N.W. 870 (South Dakota).

It is the conclusion of the Court that the Defendants are guilty of the misdemeanor charged."

In the case of Henry v. Greenville Airport Com., U. S. Dist. Court (1959) 175 F. Supp. 343, an action asserting federal jurisdiction on the basis of diversity of citizenship, general federal question, and as a class action under federal civil rights statutes was brought in a federal district court by a Negro against the Greenville, S. C., airport commission, members thereof, and the airport manager. The complaint alleged that the manager even though informed that plaintiff was an interstate traveler, ordered him to use a racially segregated waiting room. Plaintiff's motion for a preliminary injunction to restrain defendant from making distinctions based on color relative to services at the airport was denied in addition to other reasons, because it was not alleged that defendants had denied him any right under color of state law. The allegation that defendants received contributions from 'the Government' to construct and maintain portions of the airport was also stricken because it was also held to have nothing to do with the claim that he had been deprived of a civil right

under state law. Defendant's motion to dismiss was granted because plaintiff not having alleged that any thing complained of was done under color of a specified state law, failed to state a cause of action under Section 1343 of Title 28 and it being inferable from the complaint that he went into the waiting room in order to instigate legislation rather than in quest of waiting room facilities, he had no cause of action under Section 1981 of Title 42 which was said to place duties on Negroes equal to those imposed on white persons and to confer no rights on Negroes superior to those accorded white persons. It was emphasized that activities which are required by the state, must be distinguished from those carried out by voluntary choice by individuals in accordance with their own desires and social practices, the latter kind not being state action.

The court said:

> The plaintiff speaks of discrimination without unequivocally stating any fact warranting an inference of discrimination. The nearest thing to an unequivocal statement in his affidavit is the asserted fact that the purported manager of the Greenville Air Terminal 'advised him that "we have a waiting room for colored folks over there". Preceding that statement plaintiff's affidavit contains the bald assertion that the manager 'ordered me out'. However, the only words attributed to the manager by the plaintiff hardly warrant any such inference or conclusion. A like comment properly should be made concerning the further assertion in plaintiff's affidavit that he 'was required

to be segregated'. What that loose expression means is anyone's guess. From whom was he segregated? The affidavit does not say. Was he segregated from his family or from his friends, acquaintances or associates, from those who desired his company and he theirs? There is nothing in the affidavit to indicate such to be true. Was he segregated from people whom he did not know and who did not care to know him? The affidavit is silent as to that also. But suppose he was segregated from people who did not care for his company or association, what civil right of his was thereby invaded? If he was trying to invade the civil rights of others, an injunction might be more properly invoked against him to protect their civil rights. I know of no civil or uncivil right that anyone has, be he white or colored, to deliberately make a nuisance of himself to the annoyance of others, even in an effort to create or stir up litigation. The right to equality before the law, to be free from discrimination, invests no one with authority to require others to accept him as a companion or social equal. The Fourteenth Amendment does not reach that low level. Even whites, as yet, still have the right to choose their own companions and associates, and to preserve the integrity of the race with which God almighty has endowed them.

Neither in the affidavit nor in the complaint of the plaintiff is there any averment or allegation that whatever the defendants may have done to the plaintiff was done at the direction or under color of state law. It is nowhere stated in

either what right the plaintiff claims was denied him under color of state law. A state law was passed in 1928 that 'created a Commission * * * to be known as Greenville Airport Commission'. That Commission consists of five members, two selected by the City Council of the City of Greenville, two by the Greenville County Legislative Delegation, and the fifth member by the majority vote of the other four. The Commission so created is 'vested with the power to receive any gifts or donations from any source, and also to hold and enjoy property, both real and personal, in the County of Greenville, * * * *for the purpose of establishing and maintaining aeroplane landing fields* * * *; and to make such rules and regulations as *may be necessary in the conduct and operation of said aeroplane landing fields.*" (Emphasis added). Further, the Act authorizes the 'The City of Greenville * * * to appropriate and donate to said Commission such sums of money as it may deem expedient and necessary for the purpose aforesaid'. There is nothing in the Act that requires that Commission to maintain waiting rooms of any sort, segregated or unsegregated.

There is nothing in the affidavit or complaint of the plaintiff which could be tortured into meaning that the defendants had denied the plaintiff the use of the authorized airport landing fields. He had a ticket which authorized him to board a plane there. He was not denied that right. In fact there is no clear cut statement of any legal duty owed the plaintiff that defendants breached; and

there is no showing that the plaintiff was damaged in any amount by anything done by the defendants, or by any one of them, under color of state law."

* * * * * * * * *

"The jurisdiction of this court is invoked by the plaintiff under Section 1343, Title 28, U. S. Code. It is appropriate, therefore, that we consider the extent of the jurisdiction that is therein conferred on this court. By it district courts are given jurisdiction of civil actions '* * * to redress the deprivation, under color of state law, * * * of any right, privilege, or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens * * *'. Hence we must look to the complaint to ascertain (1) what right plaintiff claims he has been deprived of, (2) secured by what constitutional provision or Act of Congress providing for equal rights of citizens, and (3) under color of what state law? It is not enough for the plaintiff to allege that he has been deprived of a right or a privilege. He must go further and show what right, or privilege, he has been deprived of, by what constitutional provision or Act of Congress it is secured, and under color of what state law he has been deprived of his stated right. If the plaintiff fails to allege any one or more of the specified elements his action will fail as not being within the jurisdiction of this court.

As pointed out hereinabove, there is no allegation in the complaint that anything complained of was done under color of a specified state law.

The Court has been pointed to no state law requiring the separation of the races in airport waiting rooms, and its own research has developed none. Moreover, there is no state law that has been brought to the Court's attention, or that it has discovered, which requires the defendants, or anyone else, to maintain waiting rooms at airports, whether segregated or unsegregated. Hence the advice which it is alleged that the 'purported manager' of the Airport gave the plaintiff, saying 'we have a waiting room for colored folks over there,' could not have been given under color of a state law since there is no state law authorizing or commanding such action.

In connection with the tendered issue of the court's jurisdiction, plaintiff claims that he has a cause of action arising under Section 1981, Title 42, U. S. Code. It provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state * * * to the full and *equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind * * *" (Emphasis added).

The undoubted purpose of Congress in enacting Section 1981, was to confer on negro citizens rights and privileges equal to those enjoyed by white citizens and, at the same time, to impose on them like duties and responsibilities. The court's attention

has been directed to no law that confers on any citizen, white or negro, the right or privilege of stirring up racial discord, of instigating strife between the races, of encouraging the destruction of racial integrity, or of provoking litigation, especially when to do so the provoker must travel a great distance at public expense.

It is inferable from the complaint that there were waiting room facilities at the airport, but whether those accorded the plaintiff and other negroes were inferior, equal or superior to those accorded white citizens is not stated. It is also inferable from the complaint that the plaintiff did not go to the waiting room in quest of waiting room facilities, but solely as volunteer for the purpose of instigating litigation which otherwise would not have been started. The Court does not and should not look with favor on volunteer trouble makers or volunteer instigators of strife or litigation. A significant feature of Section 1981, which by some is little noticed and often ignored, is that it places squarely on negroes obligations, duties and responsibilities equal to those imposed on white citizens, and that said Section does not confer on negroes rights and privileges that are superior and more abundant than those accorded white citizens.

Williams v. Howard Johnson's Restaurant, et. al. argued before the Fourth Circuit Court of Appeals June 15, 1959, is in many respects similar to the instant case. As here, the plaintiff had a government job. He went from his place of public employment into the State of Virginia to demand that

he be served in a restaurant known to him to be operated by its owner, the defendant, solely for white customers. He invoked the jurisdiction of the court both on its equity side and on its law side for himself and for other negroes similarly situated. The suit was dismissed by the district court. Upon the hearing it was conceded that no statute of Virginia required the exclusion of negroes from public restaurants. Hence the Fourteenth Amendment didn't apply. No action was taken by the defendant under color of state law. Notwithstanding the absence of a state law applicable to the situation, the plaintiff argued that the long established local custom of excluding negroes from white restaurants had been acquiesced in by Virginia for so long that it amounted to discriminatory state action. The Appellate Court disagreed, and so do I. As pointed out in Judge Soper's opinion in the Howard Johnson case. 'This argument fails to observe the important distinction between activities that are required by the state and those which are carried out by voluntary choice and without compulsion by the people of the state in accordance with their own desires and social practices.' Further Judge Sopor said:

> 'The customs of the people of a state do not constitute state action within the prohibition of the Fourteenth Amendment. As stated by the Supreme Court of the United States in Shelly v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842 (92 L.ED. 1161):

'Since the decision of this court in the Civil Rights Cases, 1883, 109 U. S. 3 * * * the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment *is only such action as may fairly be said to be that of the States.* That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.' " (Emphasis supplied)

To say that the right of one person ends where another's begins has long been regarded as a truism under our system of constitutional government. While the rights and privileges of all citizens are declared to be equal by our constitution there is no constitutional command that they be exercised jointly rather than severally; and, if there were such a constitutional command, the rights and privileges granted by the constitution would be by it also destroyed. A constitution so written or interpreted would be an anomaly."

In the case of Wilmington Parking Authority and Eagle Coffee Shoppe, Inc. versus Burton, (Del. - 1960) 157 A. 2d.. 894, a Delaware Negro citizen was refused service because of race by a Wilmington restaurant located in a leased space in a public parking building owned by the Wilmington Parking Authority, a state agency. He brought a class action in a state chancery court asking for a declaratory judgment that such discrimination violated the Fourteenth Amendment and for injunctive relief.

On appeal the state supreme court reversed the trial court.

The appellate court held the fundamental problem to be whether the state, directly or indirectly, 'in reality', created or maintained the facility at public expense or controlled its operation; for only if such was the case the Fourteenth Amendment would apply.

The court held that the Authority did not locate the restaurant within the building for the convenience and service of the public using the parking facilities and had not, directly or indirectly, operated nor financially enabled it to operate.

It was held the Authority's only concern in the restaurant—the receipt of rent which defrayed part of the operating expense of providing the public with off-street parking—was insufficient to make the discriminatory act that of the state. And the fact that the City of Wilmington had originally 'advanced' 15% of the facilities, cost (the balance being financed by an Authority bond issue) was held not to make the enterprise one created at public expense for 'slight contributions' were insufficient to cause that result.

Finally, it was held the fact that the leasee sold alcohol beverages did not make it an inn or tavern, which by common law must not deny service to any one asking for it; rather, it functioned primarily as a private restaurant, which by common law and state statute might deny service to anyone offensive to other customers to the injury of its business.

"We think the case before us is distinguishable from the cases relied on by the plaintiff. In the first place, it is quite apparent, nor is there any suggestion to the contrary made by the plaintiff, that the establishment of a restaurant in the space occupied by Eagle is a pure happenstance and was not intended as a service to the public using the parking facility. As far as the record before us indicates, it was immaterial to the Authority what type of business would occupy the space now occupied by Eagle. The Authority's sole interest was in the obtaining of money in the form of rent. That money is thereafter used by the Authority to support the public purpose of supplying off-street parking from which the plaintiff and the rest of the public benefit.

It is further clear from this record, and from the Ranken case, that at no time did the Authority contemplate the establishment of a restaurant in the structure for the use of its parking patrons. On the contrary, the commercial leases entered into by the Authority were given to the highest bidders in terms of rent after the solicitation of bids by public advertisement. The decision to lease to a particular lessee was made upon the considerations of the applicants' financial responsibility and the amount of rent agreed to be paid. It is thus apparent that this case completely lacks the element of furnishing service to the public through the means of a lease to private enterprise. The only purpose for this lease is to supply a portion of the additional money required to permit

the Authority to furnish the only public service it is authorized to furnish, viz., public off-street parking.

The plaintiff argues that the use of public money to purchase a portion of the land required brings this case within the rule of the cited authorities. But we think not. At the most, approximately 15% of the total cost is represented by the public 'advance' of money. To accept the plaintiff's view would require us in all similar cases to measure the respective contributions made by public and private money and to determine at what point the public contribution changes the nature of the enterprise. It is obvious that there is no guide for judicial speculation upon such a change. If it is said that the contribution of any public money is sufficient to change the nature of the enterprise, the answer is that it has been held that a slight contribution is insufficient. Cf. Eaton v. Board of Managers, D. C. 164 F. Supp. 191.

Fundamentally, the problem is to be resolved by considerations of whether or not the public government, either directly or indirectly, in reality, is financing and controlling the enterprise which is charged with racial discrimination. If such is the case, then the Fourteenth Amendment applies; if it is not the case, the operators of the enterprise are free to discriminate as they will. Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 842, 91 L. Ed. 1161. We neither condemn nor approve such private discriminatory practices for the courts are not the keepers of the morals of the public. We

apply the law, whether or not that law follows the current fashion of social philosophy.

Particularly is this true of a state court which is called upon in this field to apply rules made for us by the Supreme Court of the United States which, in the case of this state, have resulted in the discard of a large portion of our local law dealing with the emotional subject of racial relations. We are, of course, bound to follow the Federal decisions, but we think we are equally bound, when they erode our local law, not to extend them to a point beyond which they have not as yet gone.

We think the Authority and, through it, the State of Delaware does not operate, either directly or indirectly, the business of Eagle; has not located the business of Eagle within the facility for the convenience and service of the public using the parking service; and has not financially enabled the business of Eagle to operate. The only concern the Authority has with Eagle is the receipt of rent, without which it would be unable to afford the public the service of off-street parking. This circumstance, we think, is not sufficient to make the discriminatory act of Eagle the act of the State of Delaware.

It follows, therefore, that Eagle, in the conduct of its business, is acting in a purely private capacity. It acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other re-

tail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del C Par. 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights PP 21, 22; 52 Am Jur. Theatres PP 9; Williams v. Howard Johnson's Restaurant, 4 Cir. 268 F. 2d. 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment.

Finally, plaintiff contends that 24 Del. C. PP 1501, has no application in the case at bar because Eagle, since it serves alcoholic beverages to its patrons, is a tavern or inn and not a restaurant. It is argued that, at common law, an inn or tavern could deny services to no one asking for it. We think, however, that Eagle is primarily a restaurant and thus subject to the provisions of 24 Del. C. PP 1501, which does not compel the operator of a restaurant to give service to all persons seeking such."

In the case of Slack v. Atlantic White Tower System, Inc., (U.S. Dist. Court, Maryland, 1960), 181 F. Supp. 124, a Negress, who because of race had been refused food service by a Baltimore, Maryland, restaurant (one of an interstate chain owned by a Delaware Corporation) brought a class action in federal court for declaratory judgment and injunctive relief against the corporate owner claiming that her rights under the constitution and laws of the United States had been thereby denied.

The court held that segregated restaurants in Maryland were not required by any state statute or decisional law, but were the result of individual proprietors business choice.

The court also rejected plaintiff's argument that defendant as a licensee of the state to operate a public restaurant, had no right to exclude plaintiff from service on a racial basis; rather, the restaurant's common law right to select its clientele (even on a color basis), was still the law of Maryland.

Plaintiff's further contention that the state's admission of this foreign corporation and issuance of a restaurant license to it 'invests the corporation with a public interest' sufficient to make its racially exclusive action the equivalent of state action was likewise rejected, the court holding that a foreign corporation had the same rights as domestic business corporations, and that the applicable state license laws were not regulatory. And statements in white primary cases, that when individuals or groups "move beyond matters of merely private concern' and 'act in matters of high public interest" they become "representatives of the State" subject to Fourteenth Amendment restraints, were held inapposite to this type situation where defendant had not exercised any powers similar to those of a state or city.

The Court said:

"Plaintiff seeks to avoid the authority of Williams v. Howard Johnson's Restaurant, 4 Cir., 268 F. 2d. 845, by raising a number of points not

discussed therein, and by arguing that in Maryland segregation of the races in restaurants is required by the State's decisional law and policy, whereas, she argues, that was not true in Virginia, where the Williams case arose. She also contends that the Williams case was improperly decided and should not be followed by this Court.

* * * * * * * * *

Such segregation of the races as persists in restaurants in Baltimore is not required by any statute or decisional law of Maryland, nor by any general custom or practice of segregation in Baltimore City, but is the result of the business choice of the individual proprietors, catering to the desires or prejudices of their customers.

Plaintiff's next argument is that defendant, as a licensee of the State of Maryland operating a public restaurant or eating facility, had no right to exclude plaintiff from its services on a racial basis. She rests her argument on the common law, and on the Maryland license law.

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper charged with a duty to serve everyone who applies. Williams v. Howard Johnson's Restaurant, 268 F. 2d. at 847; Alpaugh v. Wolverton, 184 Va. 943; State v. Clyburn, 101 S. Ed. 2d. 295; and authorities cited in those cases. There is no restaurant case in Maryland, but the

rule is supported by statements of the Court of Appeals of Maryland in Grenfeld v. Maryland Jockey Club, 190 Md. 96, 102, and in Good Citizens Community Protective Association v. Board of Liquor License Commissioners, 217 Md. 129, 131.

Art. 56, Secs. 151 et. seq., of the Ann. Code of Md., 1939 ed. (163 et seq of the 1957 ed), deals with licenses required of persons engaged in all sorts of businesses. Secs. 166 (now 178) provides: 'Each person, firm or corporation, resident or non-resident, operating or conducting a restaurant or eating place, shall, before doing so take out a license therefor, and pay an annual license fee of Ten Dollars ($10.00) for each place of business so operated except that in incorporated towns and cities of 8,000 inhabitants or over, the fee for each place of business so operated shall be Twenty-Five Dollars ($25.00)'. The Attorney General of Maryland has said that 'A restaurant is generally understood to be a place where food is served at a fixed price to all comers, usually at all times.' This statement was made in an opinion distinguishing a restaurant from a boarding house for licensing purposes. 5 Op. Atty. Gen. 303. It was not intended to express opinion contrary to the common law right of a restaurant owner to choose his customers. The Maryland Legislature and the Baltimore City Council have repeatedly refused to adopt bills requiring restaurant owners and others to serve all comers regardless of race; several such bills are now pending. See Annual Report of Commission, January 1960, p. 29.

Plaintiff contends that defendant is engaged in interstate commerce, that its restaurant is an instrumentality or facility of interstate commerce and thus subject to the constitutional limitations imposed by the Commerce Clause (Const. Art. 1 sec 8); and that defendant's refusal to serve plaintiff, a traveler in interstate commerce, constituted an undue burden on that commerce.

A similar contention was rejected in Williams v. Howard Johnson's Restaurant, 268 F. 2d. at 848. It would be presumptuous for me to enlarge on Judge Soper's opinion on this point.

'The action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the states. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful'. Shelley v. Kraemer, 334 U.S. 1, 13. Plaintiff seeks to avoid this limitation by arguing that the admission by the state of a foreign corporation and the issuance to it of a license to operate a restaurant 'invests the corporation with a public interest' sufficient to make its action in excluding patrons on a racial basis the equivalent of state action.

The fact that defendant is a Delaware corporation is immaterial. Once admitted to do business in the State of Maryland, it has the same rights and duties as domestic corporations engaged in the same business. This factor does not distinguish the case from Williams v. Howard Johnson's Restaurant, where the state action question was discussed at p. 847.

The license laws of the State of Maryland applicable to restaurants are not regulatory. See Maryland Theatrical Corp. v. Brennan, 180 Md. 377, 381, 382. The City ordinance, No. 1145, November 27, 1597, adding Sec. 60-½ to Art. 12 of the Baltimore City Code, 1950 ed. which was not offered in evidence or relied on by plaintiff, is obviously designed to protect the health of the community. Neither the statute nor the ordinance authorizes State or City officials to control the management of the business of restaurant or to dictate what persons shall be served.

Even in the case of licensees, such as race tracks and taverns, where the business is regulated by the state, the licensee does not become a state agency, subject to the provisions of the Fourteenth Amendment, Madden v. Queen's County Jockey Club, 296 N. Y. 243, 72 N. E. 2d. 697, cert. den. 332 U. S. 761, cited with approval in Greenfeld v. Maryland Jockey Club, 190 Md. at 102; Good Citizens Community Protective Association v. Board of Liquor License Commissioners 217 Md. 129. No doubt defendant might have had plaintiff arrested if she had made a disturbance or remained at a table too long after she had been told that she would only be sold food to carry out to her car. But that implied threat is present whenever the proprietor of a business refuses to deal with a customer for any reason, racial or other, and does not make his action state action or make his business a state agency. Plaintiff cites Valle v. Stengel, 3 Cir. 176 F. 2d. 697. In that case a sheriff's

eviction of a negro from a private amusement park was a denial of equal protection of the laws because under the New Jersey antidiscrimination law the Negro had a legal right to use the park facilities.

Plaintiff cites such cases as Nixon v. Condon, 286 U. S. 73, and Smith v. Allwright 321 U.S. 649, for the proposition that when individuals or groups 'move beyond matters of merely private concern' and 'act in matters of high public interest' they become 'representatives of the State' subject to the restraints of the Fourteenth Amendment. The distinction between holding a primary election and operating a restaurant is obvious, and has always been recognized by the courts. Defendant has not exercised powers similar to those of a state or city.

In Kerr v. Enoch Pratt Free Library of Baltimore City, 4 Cir. 149 F. 2d. 212, also relied on by plaintiff, 'the Library was completely owned and largely supported * * * by the City; * * * in practical effect its operations were subject to the City's control', as the Fourth Circuit pointed out in distinguishing the Library case from Eaton v. Board of Managers of the James Walker Memorial Hospital, 4 Cir. 261 F. 2d. 521, 527.

The argument that state inaction in the face of uniform discriminatory customs and practices in operating restaurants amounts to state action was rejected in Williams v. Howard Johnson's Restaurant, 4 Cir. 268, F. 2d. 845. Moreover, as we

have seen, the factual premise for the argument is not found in the instant case."

In the case of Fletcher versus Coney Island, Inc., (Ohio 1956), 134 N. E. 2d. 371, a Negro woman sought to enjoin the operator of a private amusement park from refusing her admittance because of her race or color.

In holding that defendant's remedy was to proceed under the State's anti-discrimination law, and not by way of injunction, the Supreme Court of Ohio said:

> "In the case of Madden v. Queens County Jockey Club, Inc., 296 N. Y. 249, 253, 72 N. E. 2d. 697, 698, 1 A. L. R. 2d. 1160, 1162, the generally recognized rule is stated as follows:
>
> 'At common law a person engaged in a public calling, such as an inkeeper or common carrier, was held to be under a duty to the general public and was obliged to serve, without discrimination, all who sought service. * * * On the other hand, proprietors of private enterprises such as places of amusement and resort, were under no such obligation, enjoying an absolute power to serve whom they pleased. * * *
>
> "*The common-law power of exclusion, noted above, continues until changed by legislative enactment.*" (Emphasis supplied.)
>
> "See also Bailey v. Washington Theatre Co., 218 Ind. 34 N. J. 2d. 17; annotation, 1 A. L. R. 2d. 1165; and 10 American Jurisprudence 915, Section 22."

"It will be thus observed that the owner or operator of a private amusement park or place of entertainment may arbitrarily and capriciously refuse admittance to whomsoever he pleases, be they Africans, Chinese, East Indians, Germans, Italians, Poles, Russians or any other racial group, in the absence of legislation requiring him to admit them."

* * * * * * *

"In summary, the decision in this case rests squarely on the proposition that at common law those who own and operate private places of amusement and entertainment can admit or exclude whomsoever they please, and that, since such establishments are open to all only through legislative enactments, those enactments govern the situation, and where as a part of those enactments a specific remedy or penalty is prescribed for their violation, such remedy or penalty is exclusive. The adequacy or appropriateness thereof being a matter of legislative concern. This decision is limited to this precise point and should be so read and appraised.

It should be obvious that the present case bears no relation whatsoever to the problem of the segregation of pupils in the public schools, or to the exclusion of a qualified person from an institution of higher learning supported by public funds or a person from a publicly owned or operated park or recreation facility, because of his race or color."

In the case of Tamelleo, et al. v. New Hampshire Jockey Club, Inc., (N. H. 1960), 163 A. 2d. 10, the plain-

tiffs presented themselves at the defendant's race track but were refused admission by the action of one of defendant's agents who ordered them to leave the premises because in his judgment their presence was inconsistent with the orderly and proper conduct of a race meeting. The plaintiffs then left the premises and thereafter instituted these proceedings.

The court said:

"It is firmly established that at common law proprietors of private enterprises such as theatres, race tracks, and the like may admit or exclude anyone they choose. Woolcott v. Shubert, 217 N. Y. 212, 222, 111 N. E. 829, L. R. A. 1916 E. 248; Madden v. Queens County Jockey Club, 296 N. Y. 249, 72 N. E. 697, certiorari denied 332 U. S. 761, 68 S. Ct. 63, 922 Ed. 346; 1 A. L. R. 2d 1165 annotation; 86 C. J. S. Theatres and shows, sec. 31. While it is true, as the plaintiffs argue and the defendants concede, that there is no common-law right in this state to operate a race track where pari-mutuel pools are sold, horse racing for a stake or price is not gaming or illegal. Opinion of the Justices, 73 N. H. 625, 631, 63 A. 505.

"However, the fact that there is no common-law right to operate a pari-mutuel race track is not decisive of the issue before us. The business is still a private enterprise since it is affected by no such public interest so as to make it a public calling as is a railroad for example. Garifine v. Monmouth Park Jockey Club, 29 N. J. 47, 148 A. 2d. 1; Madden v. Queens County Jockey Club, su-

pra. Regulation by the state does not alter the nature of the defendant's enterprise, nor does granting a license to conduct pari-mutuel pools. North Hampton Racing and Breeders Association v. New Hampshire Racing Commission, 94 N. H. 156, 159, 48 A. 2d. 472; Greenfeld v. Maryland Jockey Club, 190 Md. 96, 57 A. 2d. 335. As the North Hampton case points out, regulation is necessary because of the social problem involved. Id., 94 N. H. 159, 48 A. 2d. 475.

"We have no doubt that this state adheres to the general rule that the proprietors of a private calling possess the common-law right to admit or exclude whomever they choose. In State v. United States & C. Express, 60 N. H. 219, after holding that a public carrier cannot discriminate, Doe, C. J., stated, 'Others, in other occupations, may sell their services to some, *and refuse to sell to others.*" Id. 60 N H 261." (Emphasis supplied.)

"In Batchelder v. Hibbard, 58 N. H. 269, the Court states that a license, sofar as future enjoyment is concerned, may be revoked any time. A ticket to a race track is a license and it may be revoked for any reason in the absence of a statute to the contrary. Marrone v. Washington Jockey Club, 227 U. S. 633, 33 S. Ct. 401, 61 L. Ed. 679."

* * * * * *

"The plaintiffs also contend that if this be our law, we should change it in view of altered social concepts. This argument ignores altogether certain rights of owners and taxpayers, which still

exist in this state, as to their own property. Furthermore, to adopt the plaintiff's position would require us to make a drastic change in our public policy which, as we have often stated, is not a proper function of this court.

"The plaintiffs take the position that R. S. A. 284: 39, 40 as inserted by Laws 1959, c. 210, sec. 14, is invalid as an unconstitution delegation of legislative power. We cannot agree. Laws 1959, c. 210 is entitled: 'An act relative to Trespassing on Land of Another and at Race Tracks and Defining Cultivated Lands". Section 4 (R. S. A. 284:39, under the heading 'Trespassing' reads as follows: 'Rights of Licensee. Any licensee hereunder shall have the right to refuse admission to and to eject from the enclosure of any race track where is held a race or race meet licensed hereunder any person or persons whose presence within said enclosure is in the sole judgment of said licensee inconsistent with the orderly and proper conduct of a race meeting.' As applied to this case this provision is substantially declaratory of the common law which permits owners of private enterprises to refuse admission or to eject anyone whom they desire. Garifine v. Monmouth Park Jockey Club, 29 N. J. 47, 148 A. 2d. 1.

"The penalty provision, section 4 (R. S. A. 284:40) states: 'Penalty. Any person or persons within said enclosure without right or to whom admission has been refused or who has previously been ejected shall be fined not more than one hundred dollars or imprisoned not more than one year or

both.' This provision stands no differently than does that imposing a penalty upon one who enters without right the cultivated or posted land of another. R. S. A. 572:15 (supp) as amended. One charged with either of these offenses or with trespass at a race track would of course have a right to trial and the charge against him would have to be proved, as in any other criminal matter. No license to pass any law is given to the defendant. The situation is clearly unlike that condemned in Ferretti v. Jackson, 88 N. H. 296, 188 A. 474, and Opinion of the Justices, 88 N. H. 497, 190 A. 713, upon which the plaintiffs rely, where the milk board was given unrestricted and unguided discretion, in effect, to make all manners of laws within the field of its activity. It thus appears that there is no unlawful delegation of legislative powers in the present case."

In the case of Hall v. Commonwealth, (Va. 1948) 49 S. E. 2d. 369, Appeal Dismissed, See 69 S. Ct. 240, a Jehovah's Witness, was convicted for trespassing on private property. He sought appellate relief on the ground that the conviction violated his right to freedom of speech, freedom of the press, freedom of assembly, and freedom of worship guaranteed to him by the Constitutions of the United States and the State of Virginia.

The court said:

"The statute under which the accused was prosecuted is Chapter 165, Acts of 1934, sec. 4480a, Michie's 1942 Code, which provides: 'That if any

person shall without authority of law go upon or remain upon the lands or premises of another, after having been forbidden to do so by the owner, lessee, custodian or other person lawfully in charge or possession of such land he shall be deemed guilty of a misdemeanor, etc. * * * * *

* * * * * * *

"Mr. Justice Black in Martin v. City of Struthers, 319 U. S. 141, at page 147, 63 S. Ct. 862, at page 865, 87 L. Ed. 1313, speaking of this particular statute and other statutes of similar character, said: 'Traditionally the American Law punishes persons who enter onto the property of another after having been warned by the owner to keep off. General trespass after warning statutes exist in at least twenty states, while similar statutes of narrower scope are on the books of at least twelve states more.'

"We find nothing in the statute when properly applied which infringes upon any privilege or right guaranteed to the accused by the Federal Constitution."

* * * * * * *

"The most recent expressions of the Supreme Court of the United States on this subject are found in Marsh v. Alabama, 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265, and Tucker v. Texas, 326 U. S. 517, 66 S. Ct. 274, 90 L. Ed. 274, both of which were decided by a divided court.

* * * * * * *

"In concluding the discussion the New York court said: 'Our purpose in thus briefly analyzing

those decisions (Marsh v. Alabama and Tucker v. Texas) is to show that they do not (nor do any others of which we know) go nearly so far as appellants would have us go here. Parkchester, like Chickasaw, Alabama, and the Federal housing community in Texas, is privately owned, but there the similarity as to facts ends. It is undisputed that this defendant has never sought in any way to limit the Witnesses' activities on the streets or sidewalks of Parkchester some of which are privately and some publicly owned. The discrimination which this defendant's regulation inhibits was not on the streets, sidewalks or other public or quasi-public places, but inside of and into, the several floors and inner hallways of multiple dwellings.'

* * * * * *

"We think the Bohnke case, supra, is still the law and leaves solid the regulation of door-to-door calls along public streets. But regardless of the Bohnke ruling, no case we know of extends the reach of the bill of rights so far as to prescribe the reasonable regulation by an owner, of conduct inside his multiple dwelling. So holding, we need not examine the larger question of whether the pertinent clauses of the Constitutions have anything to do with rules made by any dwelling proprietors, governing conduct inside their edifices."

In the case of State versus Hunter, 114 So. 76, 164 La. 405, 55 A. L. R. 309, Aff. Hunter v. State of La., 48 S. Ct. 158, 205 U. S. 508. 72 L. Ed. 393, the Supreme Court of Louisiana said:

"The defendant was convicted of the offense of going on the premises of a citizen of the state, in the nighttime, without his consent, and moving or assisting in moving therefrom a tenant and his property or effects. * * * The offense was a violation of the Act No. 38 of 1926, p. 52; which makes it unlawful to go on the premises or plantation of a citizen of this state, in the nighttime or between sunset and sunrise, without his consent, and to move or assist in moving therefrom any laborer or tenant. The act declares that it does not apply to what is done in the discharge of a civil or military order."

* * * * * * *

"The defendant pleaded that the statute was violative of the guaranty in the second section of Article 4 of the Constitution of the United States that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, and was violative also of the provision in the Fourteenth Amendment that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; and violative of the due process clause and the equal protection clause of the Fourteenth Amendment."

* * * * * * *

"On the occasion referred to in the bill of information he, (defendant) went upon the plantation of one T. D. Connell, a citizen of Louisiana, in the nighttime and without Connell's consent and moved from the plantation to the state of Arkansas a tenant of Connell and the tenant's property or

effects. The defendant was employed by Cornell's tenant to do the hauling, and was not discharging any civil or military order. Some of the plantations in that vicinity were owned by citizens of Louisiana and some by persons not citizens of Louisiana. For several months previous to the occasion complained of the defendant was engaged in hauling persons and their property and effects, in the ordinary course of his business, and regardless of whether any of the persons moved were laborers or tenants on premises owned by a citizen of Louisiana or by a citizen of another state.

"The statute is not an unreasonable exercise of the police power of the state. It merely forbids a person having no right to be on the premises of another to go there in the nighttime and without the proprietor's consent —— and therefore as a trespasser —— and to move or assist in moving from the premises a laborer or tenant or his property or effects. The purpose of the statute, manifestly, is to preserve the right of every landlord or employer of farm labor to be informed of the removal from his premises of any personal property or effects. Without a statute on the subject it would be unconventional in the rural districts, to say the least, for an outsider to take the liberty of going upon the premises of another in the nighttime to cart away personal property or effects, without the landowner's consent. The statute does not discriminate with regard to those who may or may not commit the act. It forbids all alike. The discrimination is in what is forbidden. It is not forbidden

—— by this particular statute —— to trespass upon the land of one who is not a citizen of the state, by going upon his premises in the nighttime without his consent. Perhaps the Legislature used the word "citizen" not in its technical or political sense but as meaning a *resident* of the state, and perhaps the Legislature thought the law would be too harsh if it forbade those engaged in the transfer business to go upon premises belonging to a non-resident —— even in the nighttime —— without first obtaining his consent. The discrimination, therefore, is not arbitrary or beyond all possible reason. The defendant has no cause to complain that the Legislature did not go further, in enacting the law, and forbid a similar act of trespass upon the premises of a citizen of another state. If he had the right to complain of such discrimination, we would hold that the statute does not deprive the citizens of other states, owning land in this state, of any privilege or immunity guaranteed to the landowners who are citizens of this state. The privileges and immunities referred to in the second section of Article 4 of the Constitution of the United States are only those fundamental rights which all individuals enjoy alike, except insofar as they are all restrained alike. White v. Walker, 136 La. 464, 67 So. 332; Central Loan & Trust Co. v. Campbell Commission Co., 173 U. S. 84, 19 S. Ct. 346, 43 L. Ed. 623. If the trespass committed by the defendant in this case had been committed on land belonging to a citizen of another state, there would have been no violation of

the Act No. 38 of 1926; and in that event the citizen of the other state would have had no means of compelling the Legislature of this state to make the law applicable to his case, or right to demand that the courts should declare the law null because not applicable to his case. All of which merely demonstrates that the statute in question is not violative of the second section of Article 4 of the Constitution of the United States or of the due process clause or equal protection clause of the 14th. Amendment."

"These guarantees of freedom of religious worship, and freedom of speech and of the press, do not sanction trespass in the name of freedom. We must remember that personal liberty ends when the rights of others begin. The constitutional inhibition against the making of a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press does not conflict with the law which forbids a person to trespass upon the property of another."

State v. Martin, et. als. 5 So. 2d. 377, 199 La. 39.

In support of their plea of unconstitutionality, defendants cite the cases of Shelley v. Kraemer, 334 U. S. 1, 20. 68 S. Ct. 836, 92 L. Ed. 1161, Marsh v. Alabama, 326 U. S. 501, Valle v. Stengel, 176 F. 2d. 697 (3rd. Cir. 1949), and other citations contained in their brief.

The State's freedom of action in protecting the peaceful possession of private property outweighs a tres-

passer's right not to have the state enforce private discriminations. Only when this means of protecting property interests impairs a preferred fundamental right such as freedom of speech, press or religion in a context of great public interest have the courts been inclined to question the constitutionality of a statute. The present state of the law not only recognizes a man's home to be his castle, but allows the state to police his gate and coercively enforce his racial discriminations.

Assuming that arresting the defendants constituted state action (which is denied), the privileges and immunities clause of the 14th. Amendment was not violated because unlike the right to own property (Shelley v. Kraemer) which is defined by statute, there is no specific right or privilege to enter the premises of another and remain there after being asked to depart. In fact the civil and criminal laws of trespass and real property, put the privilege of peaceful possession in the owner. An extension of the doctrine of Shelley v. Kraemer one step further would mean a holding that the enforcement of a criminal statute, in itself non-discriminatory, could become discriminatory when the complainant prosecutes for discriminatory reasons and thus finding state action that discriminates because of race, creed or color.

For the reasons assigned in the authorities supporting the constitutionality of statutes similar to L. S. A.-R. S. 14:59(6), the Court holds defendants citations to be inapplicable to the factual and legal situation present in the case at bar.

Defendants' contentions are without merit.

The Court holds L. S. A.-R. S. 14:59(6) constitutional, and the bill of information filed thereunder good and sufficient in law.

The motion to quash is overruled and denied.

New Orleans, Louisiana, 28th day of November, 1960.

Sgd J. Bernard Cocke, Judge.
JUDGE

FILED: Nov. 28 60—(Sgd) E. A. Mouras, Min. Clk.

STATE OF LOUISIANA
VERSUS
SYDNEY L. GOLDFINCH, JR., ET. ALS.

NO. 168-520—
SECTION "E"
CRIMINAL
DISTRICT COURT
PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 1

This bill was reserved to the denial of the motion to quash the bill of information.

The motion addresses itself to the constitutionality of L. S. A.-R. S. 14:59(6), the Criminal Mischief statute under which defendants are charged, as well as certain supposed infirmities present in the bill of information.

In passing upon defendants' contentions, the Court filed written reasons upholding the constitutionality of L. S. A.-R. S. 14:59(6), and refusing to quash the bill of information.

The Court makes part of this per curiam the written reasons for judgment.

There is no merit to the bill.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

J U D G E

FILED: Jan. 10/61—(Sgd) E. A. Mouras, Min. Clk.

STATE OF LOUISIANA
VERSUS
SYDNEY L. GOLDFINCH, JR., ET. ALS.

NO. 168-520—
SECTION "E"
CRIMINAL
DISTRICT COURT
PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 2

As will be seen from a reading of the statute under which defendants were prosecuted (L. S. A.-R. S. 14:59(6)), the inquiry sought to be established by defendants was irrelevant and immaterial to any of the issues presented by the bill of information and the charge contained therein.

L. S. A.-R. S. 15:435 provides:

"The evidence must be relevant to the material issues."

L. S. A.-R. S. 15:441 reads in part as follows:

"Relevant evidence is that tending to show the commission of the offense and the intent, or tending to negative the commission of the offense and the intent."

L. S. A.-R. S. 15:442 states, in part:

"The relevancy of evidence must be determined by the purpose for which it is offered."

"A trial judge must be accorded a wide discretion whether particular evidence sought to be introduced in criminal prosecution is relevant to case. L. S. A.-R. S. 15:441."

State v. Murphy, 234 La. 909, 102 So. 2d.) 61.

"Exclusion of testimony on grounds of irrelevancy rests largely on discretion of trial judge." State v. Martinez, 220 La. 899, 57 So. 2d. 888.

"In order to be admissible, evidence must be both (1) relevant or material, and (2) competent.

Evidence is competent when it comes from such a source and in such form that it is held proper to admit it.

Evidence is relevant when it is persuasive or indicative that a fact in controversy did or did not exist because the conclusion in question may be logically inferred from the evidence. The criterion of relevancy is whether or not the evidence adduced tends to cast any light upon the subject of the inquiry." etc.

Wharton's Crim. Ev. (12th. Ed.) Vol. 1, p. 283, Sec. 148.

The bill is without merit.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

J U D G E

FILED: Jan. 10 61—(Sgd) E. A. Mouras, Min. Clk.

STATE OF LOUISIANA
VERSUS
SYDNEY L. GOLDFINCH, JR., ET. ALS.

NO. 168-520—
SECTION "E"
CRIMINAL
DISTRICT COURT
PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 3

The bill was reserved to the denial of defendants' motion to a new trial.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion for a new trial the Court submits same as its reasons for denying the said motion.

A reading of the statute under which defendants were prosecuted (L. S. A.-R. S. 14:59(6)), is sufficient refutation to the other allegations of the motion for a new trial, as the matters contended for were irrelevant and immaterial to any of the issues present in the proceedings.

As no request was made of the Court to charge itself on the legal questions raised by defendants in the motion for a new trial, defendants cannot be heard to complain.

The Court was convinced beyond all reasonable doubt, that each and every element necessary for conviction was abundantly proved.

The appellate court is without jurisdiction to pass upon the sufficiency of proof.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

J U D G E

FILED: Jan. 10/61—(Sgd) E. A. Mouras, Min. Clk.

STATE OF LOUISIANA
VERSUS
SYDNEY L. GOLDFINCH, JR., ET. ALS.

NO. 168-520—
SECTION "E"
CRIMINAL
DISTRICT COURT
PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. 4

This bill was reserved to the denial of defendants' motion in arrest of judgment.

Insofar as the written reasons for denying the motion to quash are applicable to defendants' motion in arrest, the court submits same as its reasons for denying the motion in arrest of judgment.

The remaining contentions of defendants have no place in a motion in arrest of judgment, and were matters of defense.

There is no merit to defendants' bill.

New Orleans, Louisiana, 10th day of January, 1961.

(Sgd) J. Bernard Cocke, Judge.

JUDGE

FILED: Jan. 10 61—(Sgd) E. A. Mouras, Min. Clk.